STATE OF MICHIGAN

COURT OF APPEALS

ALEXANDER PRINCE, LLC,

Plaintiff-Appellant,

and

CAROLYN A. PRINCE and THEODORE LINDSEY,

Plaintiffs,

v

METWEST MORTGAGE SERVICES,

Defendant-Appellee,

and

OCWEN FEDERAL BANK, FSB,

Defendant.

UNPUBLISHED
April 25, 2006

No. 259448
Wayne Circuit Court
LC No. 02-230424-CH

ALEXANDER PRINCE, LLC,

Plaintiff-Appellant,

and

CAROLYN A. PRINCE and THEODORE LINDSEY,

Plaintiffs,

v

WESTERN UNITED LIFE ASSURANCE,

Defendant-Appellee.

No. 260021
Wayne Circuit Court
LC No. 03-311111-CH

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff Alexander Prince LLC (Prince) appeals as of right from the trial court's orders granting summary disposition of plaintiffs' suit to set aside the foreclosure sale of a mortgage held by defendant Metwest Mortgage Services against certain commercial property owned by Prince. Prince also appeals as of right the trial court's order dismissing plaintiffs' separate suit against defendant Western United Life Assurance (WULA), the assignee of the Metwest mortgage, for unlawful entry onto the mortgaged property. In both cases, we affirm.

I. Basic Facts and Procedural History

The property at issue here was purchased by Prince in November 2000. Financing for the purchase was provided by Metwest pursuant to a note secured by a mortgage against the property.[1] Metwest assigned the note and mortgage to defendant WULA in December 2000, but apparently continued to service the mortgage loan on WULA's behalf.

In June 2001, Metwest informed Prince that its mortgage loan account was in arrears and requested that Prince contact Metwest to make arrangements to bring its account current. Shortly thereafter, servicing of plaintiffs' mortgage loan account was transferred to defendant Ocwen Federal Bank, FSB (Ocwen). Over the next several months, Prince attempted to rectify the arrearage by negotiating payment terms that were ultimately rejected by Ocwen and, on January 7, 2002, Prince was informed that it was in default of the terms of its note and mortgage and that its failure to rectify the default by paying all past due charges applicable to the mortgage loan within thirty-three days would result in acceleration of the note and foreclosure of the mortgage. It is not disputed that Prince failed to cure the default within the time specified and that Metwest obtained a sheriff's deed to the property following a foreclosure sale by advertisement held on February 28, 2002. The instant suits, both of which were dismissed after consolidation by the trial court, followed. Prince appeals from these dismissals as of right, raising a number of issues for this Court's review. In doing so, however, Prince has failed to cite any authority to support the various issues raised by it on appeal. This failure, as well as the cursory nature of Prince's argument for each of the issues raised, renders the entirety of the instant appeal abandoned for purposes of review by this Court. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (an appellant's failure to provide cogent argument or supporting authority constitutes abandonment on appeal). We will nonetheless address those claims for which the record and Prince's argument are sufficient to support a reasoned analysis.

[1] Personal guarantees for the note were granted by plaintiffs Carolyn Prince and Theodore Lindsey, as the sole members of Alexander Prince LLC.

II. Summary Disposition

Prince argues that the trial court erred in granting summary disposition of its complaint to set aside the foreclosure sale of its property by advertisement. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). Because both the parties and the trial court relied on matters outside the pleadings, review under MCR 2.116(C)(10) is appropriate. *Id*. Summary disposition under MCR 2.116(C)(10) is proper when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. When determining whether there is a genuine issue as to any material fact, the reviewing court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

In challenging the validity of the foreclosure sale of its property, plaintiffs asserted in their complaint that notice of the impending foreclosure sale was insufficient to support a valid sale by advertisement. Specifically, plaintiffs asserted that Metwest failed to post written notice of the sale at the property as required by MCL 600.3208, which sets forth the following requirements for foreclosure of a mortgage by advertisement:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

In support of its motion for summary disposition, Metwest provided the trial court with evidence that it began advertising the foreclosure sale of plaintiffs' property by publishing notice of the impending sale in the Detroit Legal News for at least four consecutive weeks beginning January 23, 2002. Metwest also provided the trial court with the sworn statement of Bobby Bellafant, who affirmed that within fifteen days of that initial publication he posted on the premises this same mortgage foreclosure notice by attaching the notice to "the door trim" on January 26, 2002. The fact of such notice having been posted on the premises was, however, challenged by plaintiffs and at least one tenant of the property who, in affidavits submitted with plaintiffs' complaint, denied having ever seen the notice claimed by Bellafant to have been so plainly posted. When viewed in a light most favorable to plaintiffs, these competing statements are arguably sufficient to raise a genuine issue of fact regarding whether the posting requirement of MCL 600.3208 was met in this case. *Smith*, *supra*. However, because the record is insufficient to support the setting aside of the subsequent foreclosure sale regardless whether such notice was properly made, summary disposition of plaintiffs' complaint was, nonetheless, proper.

In *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750, 755-756; 413 NW2d 99 (1987), a panel of this Court held that a failure to comply with the notice requirements

of MCL 600.3208 renders a foreclosure sale by advertisement voidable, but not void. Reasoning that where no harm results from the defect there is simply no reason to void the sale, the panel explained that:

> [b]y holding that a defect renders a foreclosure sale voidable, rather than void, more security is given to the title of real property. Such a holding also allows for an examination of whether any harm was caused by the defect. In situations where it is evident that no harm was suffered, in that the mortgagor would have been in no better position had notice been fully proper and the mortgagor lost no potential opportunity to preserve some or any portion of his interest in the property, we see little merit in [a] rule of law [that automatically nullifies the sale.] [*Id*. at 756.]

In this case, plaintiffs failed to demonstrate or even allege the loss of a "potential opportunity to preserve" their interest in the property. *Id*. To the contrary, plaintiffs acknowledged that they became aware of the foreclosure sale in June 2002 – nearly three months before expiration of the redemption period – despite the alleged failure to post notice of the foreclosure at the property. Plaintiffs, however, made no effort to redeem the property as permitted under MCL 600.3240. Instead, plaintiffs chose to delay any further transfer of the property by filing the first of the instant suits. In doing so, however, plaintiffs did not dispute that they were in default of the terms of their mortgage agreement with Metwest and offered no evidence of their financial ability to rectify the default or otherwise redeem the property. Consequently, the record does not support the conclusion that plaintiffs would have been in a "better position had notice been fully proper," and the trial court did not, therefore, err in granting summary disposition in favor of Metwest. *Id*.

III. Default

Prince also argues that because Metwest failed to file an appearance, or otherwise answer or defend this matter before entry of an April 2003 default in plaintiffs' favor, the trial court erred in subsequently setting that default aside. We again disagree.

Whether a default or default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). The setting aside of a default or default judgment is governed by MCR 2.603(D), which provides that a trial court may not order a default set aside unless the defaulted party demonstrates good cause and presents an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1). Good cause sufficient to warrant setting aside a default or a default judgment may be demonstrated by (1) a substantial procedural defect or irregularity, or (2) a reasonable excuse for failing to comply with the requirements from which the default arose. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229-230; 600 NW2d 638 (1999).

With respect to Prince's assertion that Metwest failed to appear in this matter before entry of the April 2003 default, we note that an oral appearance on behalf of Metwest was expressly entered by counsel for Ocwen at a March 7, 2003 hearing on Ocwen's motion for relief from judgment. Although a written appearance on behalf of Metwest was not filed until the following May, this Court has previously held that communications between counsel for the purpose of

settlement, attendance at a scheduling meeting, and even an informal request for an extension of time to file an answer were sufficient to be deemed an appearance for purposes of the rules regarding default. See *Ragnone v Wirsing*, 141 Mich App 263, 265-266; 367 NW2d 369 (1985) ("any action on the part of defendant . . . which recognizes the case as in court, will constitute a general appearance") (citation and internal quotation marks omitted). MCR 2.117(B)(1) also expressly provides that an attorney may appear in a case "by an act indicating that the attorney represents a party in the action," and that "[a]n appearance by an attorney for a party is deemed an appearance by the party." Because defense counsel's March 7, 2003 oral appearance on behalf of Metwest was sufficient to recognize "the case as in court", we reject Prince's assertion that Metwest failed to appear in this matter prior to entry of the April 2003 default. *Ragnone*, *supra*; MCR 2.117(B)(1).

We also reject Prince's assertion that Metwest thereafter improperly failed to answer or defend against plaintiffs' suit to set aside the foreclosure sale. Following the March 7, 2003 hearing on Ocwen's motion for relief from judgment, the parties stipulated to entry of an order requiring, among other things, that plaintiffs amend and re-serve their pleadings on all named defendants. Rather than do so, however, plaintiffs caused the April 2003 default to be entered against Metwest for failure to appear or otherwise answer and defend this matter. In seeking to set the default aside Metwest argued that plaintiffs' conduct in causing the April 2003 default to be entered directly contravened the stipulated order requiring that it serve amended pleadings on all party defendants, and constituted good cause to set the default aside under MCR 2.603(D)(1). The trial court agreed and, after concluding that defense counsel's factual averments attesting to the propriety of the foreclosure sale under the applicable law were sufficient to show that Metwest "may have a meritorious defense to [plaintiffs'] claims," set the default aside. We find that the trial court properly exercised its discretion in reaching this conclusion and setting aside the default.

Indeed, under the circumstances of this case, plaintiffs' entry of a default in lieu of the amended pleadings required by the stipulated order constitutes a "substantial procedural defect or irregularity" for purposes of establishing the good cause necessary to set the default aside. *Alken-Ziegler*, *supra*. Moreover, because a trial court lacks the authority to set aside a foreclosure sale where the statutory requirements for foreclosing the mortgage were followed, see, e.g., *Freeman v Wozniak*, 241 Mich App 633, 637-638; 617 NW2d 46 (2000), defense counsel's factual averments attesting to the propriety of the foreclosure sale under the applicable law satisfied the "meritorious defense" requirement of MCR 2.603(D)(1).[2] Consequently, the trial court did not abuse its discretion in setting aside the April 2003 default against Metwest.

---

[2] To the extent plaintiffs assert that the affidavit of meritorious defense filed by Metwest was insufficient to meet the requirements of MCR 2.603(D)(1) because the facts therein were attested to by its counsel, we note that the rule places no restrictions on those who may validly file the required affidavit, but rather, merely requires that "an affidavit of facts showing a meritorious defense is filed." Thus, insofar as the affidavit at issue complies with the requirements of MCR 2.119(B)(1), i.e., that it "be made on personal knowledge" of particular facts to which the affiant can competently testify if sworn, we find the affidavit to be sufficient. See *Miller v Rondeau*,
(continued…)

IV. Reinstatement

Prince also argues that the trial court erred in denying their motion to reinstate their suit for unlawful entry, which was dismissed by the court after plaintiffs and their counsel failed to appear for trial. Prince does not dispute that, "[w]here plaintiff and counsel fail to appear at a duly scheduled trial, the trial court may in its discretion dismiss the suit and subsequently deny a motion for reinstatement." *Williams v Kroger Food Co*, 46 Mich App 514, 516; 208 NW2d 549 (1973); see also *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). Prince argues, however, that its counsel's representations to the court concerning the emergency medical circumstances leading to their absence at trial were sufficient to excuse their absence at trial and reinstate their suit. We do not agree.

In *Banta v Serban*, 370 Mich 367, 369; 121 NW2d 854 (1963), our Supreme Court recognized that "trial judges must be empowered to invoke [the] drastic sanction [of dismissal] if judicial control of trial dockets is to be retained." Thus, the Court held that "[w]hen parties fail to appear for trial, after due notice to counsel, . . . trial judges should order dismissal, enter default judgment or grant other appropriate relief subject, of course, to subsequent vacation in the event such absence is proved unavoidable or otherwise excusable and justice so requires." *Id*. at 369-370.

Here, in seeking reinstatement of plaintiffs' suit, counsel for plaintiff provided the trial court with documentation in which he averred that shortly after telephoning the trial court to inform it that he and plaintiff Carolyn Prince were en route to trial, he experienced an "extreme and excruciating pain" in his head. Counsel further indicated that Ms. Prince thereafter rushed him to an emergency room and contacted the trial court with that information "as soon as [thereafter] possible," but that the trial court had already dismissed the case. At a hearing on the matter, counsel also provided the court with documentation indicating that he had in fact been seen by a physician at the emergency department of a local Veterans Administration (VA) hospital on the morning of the trial. The trial court, however, found this documentation, which merely indicated that counsel was at the VA emergency department some three hours after trial was scheduled to begin, was simply not "good enough" to excuse the previously unexplained absence of both plaintiffs and their counsel at trial. The trial court nonetheless agreed to adjourn the matter after counsel for plaintiff indicated that he would "secure additional information from [his] physician" explaining in "very good detail" the circumstances of the illness that prompted his absence from court. In doing so, however, the court informed counsel that to warrant reinstatement of the suit, it would require information sufficient to show that counsel in fact "needed" emergency treatment. Despite this admonition from the court, when the parties returned to the trial court more than one month later, counsel produced only a single document indicating merely that he suffered from "hypertension and headaches." The trial court found this to be insufficient and denied plaintiffs' request to reinstate their suit.

We find that the trial court correctly rejected plaintiffs' proffered explanation for having failed to appear at trial as insufficient to support reinstatement of plaintiffs' suit. Although

(…continued)

174 Mich App 483, 487; 436 NW2d 393 (1989); cf. *Hartman v Roberts-Walby Enterprises, Inc*, 17 Mich App 724, 729-730; 170 NW2d 292 (1969).

counsel for plaintiffs asserted a sudden and unexpected illness as the reason for plaintiffs' failure to appear for trial, he failed to produce evidence sufficient to permit the trial court to conclude that the illness alleged rendered the parties' absence on the day of trial "unavoidable or otherwise excusable." *Id*. Indeed, despite having agreed to do so, counsel for plaintiff produced no evidence that his alleged visit to the emergency room was sufficiently necessary to excuse the unexplained absence of both plaintiffs and their counsel for the more than two hours before the suit was dismissed. Given this failure, it cannot be said that the trial court abused its discretion in denying plaintiffs' request to reinstate their suit. *Williams*, *supra*.

V. Failure to Receive Evidence

We further conclude that Prince's argument that, by failing to receive evidence of bankruptcy proceedings initiated by the parent company of defendants Metwest and WULA and to permit counsel for plaintiff to make a record of the medical basis for plaintiffs' failure to appear at trial, the trial court deprived plaintiffs of the ability to present information directly impacting upon the court's decisions regarding summary disposition and reinstatement of plaintiffs' suit for unlawful entry and conversion, is without merit. As argued by defendants, insofar as plaintiffs have failed to cite to any portion of the record wherein the trial court declined to accept, or otherwise prevented plaintiffs from presenting evidence of bankruptcy proceedings relevant to the instant causes of action, plaintiffs have failed to sufficiently support or otherwise show any error on the part of the trial court. See MCR 7.212(C)(7). Moreover, as previously discussed, counsel for plaintiffs was given ample opportunity to make a record of the medical reasons underlying plaintiffs' failure to appear for trial, but failed to adequately do so.[3]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

[3] We do not address the remainder of the issues raised by Prince on appeal, which are acknowledged by Prince as beyond the scope of both the lower court record and this Court's review.